

United States
12
Circuit Court of Appeals
For the Ninth Circuit.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD,
FIDELITY SAVINGS & LOAN ASSOCIA-
TION, a Corporation, and PIMA FARMS
COMPANY, a Corporation, et al.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

FILED

JUN 13 1923

F. D. MONKTON,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD,
FIDELITY SAVINGS & LOAN ASSOCIA-
TION, a Corporation, and PIMA FARMS
COMPANY, a Corporation, et al.,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. ARMSTRONG, LEWIS & KRAMER,
Phoenix, Arizona, JAMES R. MOORE, Es-
quire, Phoenix, Arizona,
Solicitors for Appellant.

Messrs. KINGAN, CAMPBELL & CONNER,
Tucson, Arizona,
Solicitors for Appellees.

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the
Firm Name and Style of EDWIN R. POST
COMPANY; EDNA S. POST, Wife of ED-
WIN R. POST; VALLEY FARMS
WATER COMPANY, a Corporation;
MOSE DRACHMAN, as Receiver of the
Property and Effects of EDWIN R. POST,
and VALLEY FARMS WATER COM-
PANY, a Corporation; ALBERT STEIN-
FELD, BETTINA V. STEINFELD, Wife
of ALBERT STEINFELD; FIDELITY
SAVINGS & LOAN ASSOCIATION, a
Corporation; and PIMA FARMS COM-
PANY, a Corporation,

Defendants.

Second Amended Complaint.

The plaintiff T. M. Caldwell, by his solicitors Armstrong, Lewis & Kramer and James R. Moore, by leave of Court first had and obtained, files this, his second amended complaint, and for cause of action against the defendants and each of them, alleges:

I.

That at all times herein mentioned Edwin R. Post was doing business under the firm name and style of Edwin R. Post Company; that the Valley Farms Water Company is an Arizona corporation, having its principal office and place of business in the City of Tucson, State of Arizona; that Albert Steinfeld and Mose Drachman were by this Honorable Court, in that certain cause now pending therein, entitled "Western Machinery Company, a corporation, and Reuben R. Schweitzer, plaintiffs, vs. Edwin R. Post and Valley Farms Water Company, a corporation, defendants," appearing on the docket of this [1*] court as Tucson-Equity No. 94, appointed receivers of the properties and effects of the defendants, Valley Farms Water Company and Edwin R. Post, including the property hereinafter described; that the said Albert Steinfeld has heretofore resigned his office as such receiver and the defendant Mose Drachman is now the duly appointed, qualified and acting receiver thereof; that the property, canals, water ditches

*Page-number appearing at foot of page of original certified Transcript of Record.

and irrigation system hereinafter described and upon which the plaintiff claims a lien for the foreclosure of which this action is brought, is now in the possession of the said Mose Drachman, receiver as aforesaid, and through said receiver in the possession, control and under the direction of this Honorable Court; that the Fidelity Savings & Loan Association is a California corporation and has its principal office and place of business in Los Angeles, State aforesaid; that the Pima Farms Company is an Arizona corporation, having its principal office and place of business in Tucson, State aforesaid.

II.

That on and prior to the 16th day of October, 1919, and at all times subsequent thereto up to and including the date of the filing of the original complaint in this cause, the defendants Edwin R. Post, Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina V. Steinfeld, were owners and in possession of the following described canals and water ditches, sometimes known as the Valley Farms Water Company project or system, and also known as the Santa Cruz Valley Farms project, and Post project, situated in the County of Pima, State of Arizona, and described as beginning approximately nine miles northwest of Tucson, County and State aforesaid, and running thence [2] west along the Southern Pacific Railroad to the Pinal County line, including all of its rights of way, bed and banks and lands used in connection therewith, and its flumes, culverts, gates,

dams, wells, pumps and pumping plant supplying and intending to supply the said canals and water ditches with water, and to be used therewith for the irrigation of lands owned by the defendants and in their possession known as the Post project, also Valley Farms Water Company project, and also as Santa Cruz Valley Farms project, the same constituting an entire connected and related system of irrigation for said lands. That the said Edwin R. Post on and prior to the 16th of October, 1919, and at all times subsequent thereto, and until the filing of the original complaint herein, had charge or control of the construction of said canals, water ditches, flumes, culverts, gates, dams, wells, pumps and pumping plants, with the knowledge and consent of the other defendants named in this paragraph.

III

That on, to wit, the 16th day of October, 1919, the plaintiff entered into a written contract with the defendant Edwin R. Post acting for himself individually and as agent for the defendants named in the preceding paragraph for the furnishing of the labor of certain horses and mules, and of certain machinery, fixtures and tools to be used in the construction of said canals and water ditches and other works and structures as aforesaid, which contract is in words and figures as follows, to wit:

“AGREEMENT.

THIS AGREEMENT, made and entered into this 16th day of October, 1919, by and between T. M. CALDWELL of Phoenix, Arizona, as party

of the first part, and E. R. POST of Tucson, Arizona, as party of the second part,

WITNESSETH, That [3]

WHEREAS, the party of the first part is the owner of the livestock and other personal property hereinafter and more particularly described and is desirous of letting the use thereof to the party of the second part at the rental and upon the terms and conditions hereinafter set forth; and

WHEREAS, the party of the second part is desirous of hiring the use of said property at such rental and upon such terms and conditions;

NOW THEREFORE, in consideration of these premises, and of the sum of One (1) Dollar, lawful money of the United States, each to the other of the parties hereto paid, the receipt whereof is hereby acknowledged, and in consideration of the premises and covenants of each of the parties hereto hereinafter contained and by them hereafter to be kept and performed, it is agreed as follows, to wit:

1. That the said party of the first part does hereby let the use and deliver possession f. o. b. the cars at Phoenix, Maricopa County, Arizona, to the said party of the second part, and the said party of the second part does hereby hire the use and shall receive possession f. o. b. the cars at Phoenix aforesaid from the said party of the first part, the following described property at the following designated rental, to wit:

24 or more teams of mules and harness therefor,
at \$30.00 per mo. per team;

12 or more Fresno scrapers at \$7.50 per mo. per scraper;

2 or more plows at \$7.50 per mo. per plow;

4 or more 2-horse Fresno scrapers at \$7.50 per mo. per scraper;

6 or more 12x14 feet tents at \$5.00 per mo. per tent;

Mess equipment for 30 or more men at \$1.00 per mo. per man;

4 or more wagons at \$12.50 per mo. per wagon;

Necessary blacksmith equipment at \$20.00 per month.

The foregoing specifically mentioned amount of property being the minimum amount usable hereunder, and any additional amount of any thereof shall be furnished as aforesaid by the party of the first part to and on the demand of the party of the second part; provided the first party be not required to furnish more than 80 head of mules altogether with equipment therefor and upon not less than two weeks notice.

2. The party of the first part shall purchase of the party of the second part not less than forty (40) acres of the land comprising the enterprise of the party of the second part; such land being either that certain 50 acre tract known and described as ————, and which has been heretofore examined and designated as preferable by the first party; or any other 40 acre tract in said project remaining unsold by October 20th, 1919, and which the first party may select on or before October 20th, 1919, the price of the tract being \$150.00

per acre, with good and perfect title and accompanied by the Valley Farms Water Co. contract in the form now used for water contracts for water for said project, and the regularly printed forms of the party of the second part shall be used in the matter of the purchase, sale and conveyance of and the water respecting such land; [4]

3. The party of the second part shall defray the expense of the transportation of said property, after same shall be aboard the cars, from the loading point at Phoenix to the place where the said party of the second part shall establish his first camp;

4. Said property shall be in good workable and usable condition upon arrival at said first camp, and said party of the second part shall be in no wise liable or responsible for any injury whatever occurring to any of said property en route and prior to such arrival;

5. The party of the second part shall pay and be liable for all the necessary feeding and care of the live stock and the care, repair and upkeep of the implements and other of said property, and, excepting usual and ordinary wear and tear and acts of God and the death of live stock from natural cause, said party of the second part shall re-deliver said property to said party of the first part in as good condition as when delivered and received, and such re-delivery shall be made on cars at nearest shipping point by said party of the second part, if said first party so requests;

6. The rental provided for in condition 1 hereof shall be payable as follows, to wit: \$400.00 per month thereof shall be retained and applied by the said party of the second part toward and on account of the payment of the purchase price of the land being purchased by the party of the first part from the party of the second part, as mentioned in condition 2 hereof, during the life of this agreement, unless said payments shall sooner complete such purchase; no rental payment shall be made until sixty (60) days next after the signing of this agreement and the arrival of said property on the lands of said party of the second part, but within five (5) days after the end of said sixty (60) day period settlement and deductions shall be made for the said period; thereafter said deductions for land payments and settlements for rentals shall be made on or before the 5th day of each month for the calendar month next theretofore preceding; and this agreement shall continue in force and effect until the rentals hereunder shall aggregate not less than the total sum of six thousand (\$6,000) dollars, but it may be continued for such period of additional time as the said party of the second part shall require the use of said property;

7. All live stock dying or becoming unusable from other than natural cause shall be paid for by the said party of the second part at the rate of \$150.00 per head;

8. All live stock dying or becoming unusable from natural causes, and all such of the other prop-

erty as shall by ordinary and usual wear and tear in due course wear out and become unusable, shall, upon demand of party of the second part, be replaced by the said party of the first part;

9. This agreement and all of the terms and conditions hereof shall be and hereby are made binding upon the heirs and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first hereinabove mentioned.

T. M. CALDWELL.

EDWIN POST." [5]

That subsequently and on, to wit, the first day of April, 1920, a further and supplemental agreement in writing was entered into between the plaintiff and the defendant Edwin R. Post, acting for himself individually and as agent for the defendants named in the preceding paragraph, by which it was agreed that the labor of certain horses and mules and the machinery, fixtures and tools described in the contract of October 16, 1919, above set forth, was to be further used by the said Post in and upon the construction of said canals and water ditches and other works and structures as aforesaid, upon the same terms and conditions as provided in said original written contract of October 16, 1919, which said written agreement of April 1, 1920, is in words and figures as follows, to wit:

"AGREEMENT.

THIS AGREEMENT, made and entered into this first day of April, 1920, by and between T. M.

CALDWELL, of Phoenix, Arizona, as party of the first part, and EDWIN R. POST, of Tucson, Arizona, as party of the second part, WITNESSETH: That,

WHEREAS under date of October 16, 1919, a contract was entered into by the parties above noted, covering the rental by party of the first part to party of the second part of stock and grading equipment, and

WHEREAS the agreement above referred to did not state any specified time during which this stock shall be available for use by party of the second part and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work which it is desired to use this stock for.

NOW, THEREFORE, in the consideration of these premises and of the sum of One Dollar, lawful money of the United States each to the other of the parties hereto paid, the receipt whereof is hereby acknowledged, and in consideration of the promises and covenants of each of the parties hereto hereinafter contained and by them hereafter to be kept and performed, it is agreed as follows, to wit:

First: That the party of the first part will rent to the party of the second part, under the same terms and conditions as are embodied in the agreement of October 16, 1919, the stock and equipment now in the possession of the party of the second part until the first of June, and for such longer

period as may be necessary to complete the construction work remaining to be done on that portion of the Santa Cruz Valley [6] Farms project lying south and east of the syphon crossing of the Santa Cruz River, a short distance above Rillito.

The party of the second part agrees to keep the stock and equipment of the party of the first part now in his possession under the same terms and conditions as provided for in the agreement of October 16, 1919, until June first, 1920, and for such longer period as may be necessary to complete that portion of the construction work on the Santa Cruz Valley Farms tract of the party of the second part, above referred to.

Second: This agreement and all of the terms and conditions hereof shall be and hereby are made binding upon the heirs and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first hereinabove mentioned.

T. M. CALDWELL.

EDWIN R. POST."

IV.

That under and by virtue of said written agreements of October 16, 1919, and April 1, 1920, respectively, the plaintiff furnished for use and there was used by the said Edwin R. Post, in and upon the construction of the canals and water ditches hereinbefore described, the labor of the horses and mules and the machinery, fixtures and

tools mentioned in said contracts, all the property of this plaintiff, from the 16th day of October, 1919, to and including the 19th day of July, 1920; that the reasonable as well as the agreed value for the use of said horses, mules and equipment upon said work as aforesaid was the sum of Nine Thousand Six Hundred Ninety-two and 55/100 Dollars (\$9,692.55); that all of said amount became due and payable from the said Post to this plaintiff on to wit, the 5th day of August, 1920, and that of said sum of \$9,692.55 there has been paid thereon by the said Post the sum of Four Thousand Three Hundred Forty-one and 50/100 Dollars (\$4,341.50), and no more, and that there is now due and owing to this plaintiff from the said Edwin R. Post, and from the defendant, [7] Mose Drachman, as receiver as aforesaid, for the use of said horses, mules and equipment in the building and constructing of said canals and water ditches hereinabove described a balance of Five Thousand Three Hundred Fifty-one and 5/100 Dollars (\$5,351.05) after deducting all just credits and offsets.

V.

That within ninety days after the completion of said canals and water ditches as aforesaid, and on, to wit, the 19th day of October, 1920, the plaintiff made duplicate copies of a notice and claim of lien upon the canals, water ditches and property hereinabove described, and filed one copy thereof with the County Recorder of the County of Pima, State of Arizona, and served one copy thereof upon each of the defendants, Edwin R. Post, Valley

Farms Water Company, and Albert Steinfeld and Mose Drachman, as receivers aforesaid, and upon Albert Steinfeld individually, and Bettina Steinfeld, the owners of said improvements, which said duplicate copies of notice and claim of lien were signed and sworn to before an officer authorized to administer oaths in the County of Maricopa, State of Arizona, and had attached thereto a true copy of the written contracts under which said horses, mules and equipment were furnished as aforesaid, and contained—

(a) A general description of the lands and improvements to be charged with the lien, sufficient for identification;

(b) The name of the owner or reputed owner of the property concerned, and also the name of the person by whom the plaintiff was employed or to whom he furnished for use in the building and construction of said canals and water ditches the horses, mules and equipment described in said written contract; and [8]

(c) A statement of the plaintiff's demand after deducting all just credits and offsets.

VI.

This suit is filed by leave of this Honorable Court first had and obtained.

VII.

Plaintiff alleges that the defendants, Fidelity Savings & Loan Association and Pima Farms Company, assert some claim, right, title or interest in and to said canals and water ditches, including all of its rights of way, bed and banks, and land used

in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, but he alleges that any claim, right, title or interest they may have therein is subject and subordinate to plaintiff's said lien thereon.

WHEREFORE, plaintiff prays judgment—

(1) That he be adjudged to have a lien on said canals and water ditches, including all of its rights of way, bed and banks, and land used in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, for the sum of Five Thousand Three Hundred Fifty-one and $5/100$ Dollars (\$5,351.05), together with interest thereon from the 5th day of August, 1920, prior to all other liens, claims and demands thereon of the defendants, or any person claiming by, through or under them or either of them;

(2) That the defendants and each of them, and all persons claiming by, through or under them or either of them, [9] be foreclosed of all equity of redemption or other interest in said property;

(3) That the interests of the defendants and each of them in said property be sold as provided by law, and that from the proceeds of such sale the plaintiff be paid the amount of his lien aforesaid, and interest thereon from the 5th day of

August, 1920, together with the expenses of sale and costs of this action;

(4) That the plaintiff have judgment against the defendants, Edwin R. Post, Valley Farms Water Company, and Mose Drachman, as receiver aforesaid, for any deficiency that may remain due him on such sale;

(5) That plaintiff have such further judgment, decree or order as to the Court may seem meet.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,

Solicitors for Plaintiff.

[Endorsed]: Filed May 7, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By R. C. McAllaster, Deputy Clerk. [10]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the
Firm Name and Style of EDWIN R. POST
COMPANY, et al.,

Defendants.

Motion to Dismiss.

Come now the defendants Albert Steinfeld and Bettina V. Steinfeld, and move the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against these defendants or either of them, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against these defendants or either of them.

WHEREFORE these defendants pray that this their motion be allowed and granted and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendants Albert Steinfeld and
Bettina V. Steinfeld.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [11]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the
Firm Name and Style of EDWIN R. POST
COMPANY, et al.,

Defendants.

Motion to Dismiss.

Comes now the defendant Pima Farms Company, a corporation, and moves the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against this defendant, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against this defendant.

WHEREFORE, this defendant prays that this its motion be allowed and granted, and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendant Pima Farms Company,
a Corporation.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [12]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the
Firm Name and Style of EDWIN R. POST
COMPANY, et al.,

Defendants.

Motion to Dismiss.

Comes now the defendant Fidelity Savings & Loan Association, a corporation, and moves the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against this defendant, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against this defendant.

WHEREFORE, this defendant prays that this its motion be allowed and granted, and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendant Fidelity Savings & Loan
Association, a Corporation.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [13]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

**Decree Dismissing Second Amended Complaint as
Against Albert Steinfeld, Bettina Steinfeld,
Fidelity Savings & Loan Association and Pima
Farms Company.**

It having been stipulated in open court between counsel for the plaintiff and for the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, that the motion of said defendants to dismiss the amended complaint, heretofore sustained, should be considered as having been refiled as to the second amended complaint, and this cause as to the said defendants having been heard upon the second amended bill of complaint, and said defendants' motions to dismiss the same, and said motions to dismiss having been sustained, and plaintiff having elected to stand upon his pleadings, and the Court being fully advised in the premises,

It is by the Court **CONSIDERED, ADJUDGED AND DECREED:**

That the second amended bill of complaint of plaintiff be and the same is hereby dismissed for want of equity as against the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, and that said defendants have and recover of the plaintiff their costs herein laid out and expended, to all of which the plaintiff excepts.

Done in open court this 7th day of May, 1923.

By the Court:

M. T. DOOLING,
Judge.

Approved as to form May 12, 1923.

KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [14]

In the District Court of the United States for the
District of Arizona.

No. E—94—TUCSON.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the
Firm Name and Style of EDWIN R. POST
COMPANY, etc., et al.,

Defendants.

Opinion and Order Sustaining Motions to Dismiss.

ARMSTRONG, LEWIS & KRAMER, Attorneys
for Plaintiff.

KINGAN, CAMPBELL & CONNER, Attorneys
for all Defendants except Fidelity Savings &
Loan Association.

Plaintiff seeks to have established and enforced

a lien upon certain canals, and water ditches, rights of way, bed and banks and land used in connection therewith, together with the flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and ditches with water, the said canals, ditches, etc., being those of Valley Farms Water Company project, also known as the Santa Cruz Valley Farms project, and the Post project, situated in Pima County, and described particularly in the complaint. It is averred that the defendants, other than Pima Farms Company and Fidelity Savings and Loan Association, are the owners and in possession of the property, but there is no averment as to who owned the property at the time the contract sued upon was entered into, or the work alleged was done. It is averred that plaintiff entered into a written contract with defendant Edwin R. Post, for the furnishing to him of certain horses, mules and construction [14½] equipment to be used in and upon the building and construction of the canals and water ditches described, and the said contract is set out in full. The contract itself makes no mention of where or for what purpose the property thus to be furnished was to be used. It is further averred, however, that by virtue of said agreement, and a supplemental written agreement extending the time of use of said property, plaintiff furnished for use, and there was used by said Post in and upon the construction of the canals and water ditches described, the horses, mules and construction equip-

ment mentioned in the contracts, and that the reasonable as well as the agreed value for the use of said horses, mules and equipment upon said work was \$9,692.55, and that of said amount only \$4,341.50 has been paid by said Post, and that there is still due from said Post \$5,351.05 for the use of said horses, mules and equipment in the construction of said canals and water ditches after deducting all just credits and offsets. Then follow appropriate averments of the filing and delivery of the necessary notices to create a lien under the Arizona statute.

The complaint is challenged by motions to dismiss.

Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party who stands in the place of the owner by reason of his contract of hiring. *McMullin vs. McMullin*, 42 Atl. 500; *Richardson vs. Hoxie*, 38 Atl. 142; *Edwards vs. Lumber Co.*, 84 N. W. 150; *Mabie vs. Sines*, 52 N. W. 1007; *McKinnon vs. Lumber Co.*, 138 N. W. 781; *Lohman vs. Peterson*, 58 N. W. 407; *McAuliffe vs. Jorgenson*, 82 N. W. 706, and *Potter Co. vs. Myer*, 86 N. E. 838. [15]

As the teams were furnished to Post, who is not averred to have been the owner of the canals,

ditches, etc., at the time of the hiring and use by him of the teams and equipment, if there be any right of lien accorded by the Arizona statute, such right would be accorded to Post, and not to the plaintiff. For this reason the present complaint does not state a cause of action and the motions to dismiss will be granted.

April 24th, 1923.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 24, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By. R. C. McAllaster, Deputy Clerk. [16]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

**Petition for Appeal to the United States Circuit
Court of Appeals for the Ninth Circuit.**

The above-named plaintiff considering himself aggrieved by the decree made and entered on the 7th day of May, 1923, in the above-entitled cause,

dismissing his second amended complaint as to the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record of the proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Plaintiff.

Order Allowing Appeal and Fixing Bond.

The above and foregoing application for appeal and assignments of error of the plaintiff being presented to the Court [17] with said application for appeal, it is ORDERED that said appeal be allowed as prayed for.

Appeal bond fixed at Three Hundred Dollars (\$300.00).

Dated this 12th day of May, 1923.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk.
[18]

In the District Court of the United States in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Assignments of Error on Appeal.

The plaintiff says that the decree rendered in the above-entitled cause on May 7th, 1923, dismissing his bill of complaint as against the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, is erroneous, and against his just rights, for the following reasons:

(1) That under the facts alleged in his second amended bill of complaint and the law of the State of Arizona, he is entitled to the relief prayed for in his second amended complaint against said defendants and each of them.

(2) Because the Court erred in sustaining the motions of the defendants Albert Steinfeld, and Bettina Steinfeld, his wife, to dismiss the plaintiff's second amended complaint.

(3) Because the Court erred in sustaining the motion of the defendant Fidelity Savings & Loan Association to dismiss the plaintiff's second amended complaint.

(4) Because the Court erred in sustaining the motion of the defendant Pima Farms Company to dismiss the plaintiff's second amended complaint.

(5) Because, under the facts alleged in the plaintiff's second amended complaint, and the law of the State of Arizona, the plaintiff is entitled to a lien upon the ditches, canals [19] and improvements described in the plaintiff's second amended complaint for the payment of the amount alleged to be due him on account of the labor of horses, machinery, tools and fixtures furnished by the plaintiff to be used in the construction of the canals and water ditches and other works and structures mentioned in the second amended complaint, under the terms of the contracts set out in the second amended complaint.

WHEREFORE, plaintiff prays that the said order and decree be reversed, and that the Court be directed to vacate said decree and to enter an order overruling the respective motions of said defendants to dismiss plaintiff's second amended bill of complaint.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,

Solicitors for Plaintiff.

[Endorsed]: Received copy of the within this
12th day of May, 1923.

KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [20]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD,
FIDELITY SAVINGS & LOAN ASSOCIA-
TION, a Corporation, and PIMA FARMS
COMPANY, a Corporation,

Appellees.

Citation on Appeal (Copy).

The President of the United States to Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company,
GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, District of Arizona, wherein T. M. Caldwell is complainant and

Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, et al., are defendants, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and speedy justice should not be done in their behalf.

M. T. DOOL-

M. T. D. WITNESS the Honorable ~~W. H. SAW-~~
ING

~~TELLE~~, Judge of the United States District Court for the District of Arizona, this 11 day of May, 1923.

M. T. DOOLING,
Judge. [21]

Service of the within citation and receipt of a copy thereof admitted this 11 day of May, 1923.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

[Endorsed]: Copy of within received this 12th day of May, 1923.

KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By. Agnes Borrego, Deputy Clerk [22]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, T. M. Caldwell, as principal, and United States Fidelity & Guaranty Company, a corporation duly organized under the laws of the State of Maryland and authorized to transact a surety business in the State of Arizona, as surety, are held and firmly bound unto Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, in the full and just sum of Three Hundred Dollars (\$300.00), to be paid to the said obligees, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed with our seals and dated this 10 day of May, 1923.

WHEREAS, lately, in the District Court of the United States for the District of Arizona, in a suit

depending in said court between the above-named plaintiffs and defendants, a decree was rendered against the said plaintiff, and plaintiff having obtained an appeal and filed a copy thereof in the office of the Clerk of said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Albert [23] Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, and Pima Farms Company, citing and admonishing each of them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California,

NOW, THE CONDITION of the foregoing obligation is such that if the said T. M. Caldwell shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation shall be void, else to remain in full force and virtue.

IN WITNESS WHEREOF the principal has hereto set his hand and seal, and the surety has caused its corporate name to be hereto subscribed and its corporate seal to be hereto affixed by its duly authorized and appointed attorney in fact, this 10 day of May, 1923.

T. M. CALDWELL, (Seal)

UNITED STATES FIDELITY & GUAR-
ANTY CO.,

[Corporate Seal] By JULIAN A. GANZ,
Attorney-in-fact.

Approved:

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [24]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

EDWIN R. POST et al.,

Appellees.

Praecipe for Transcript of Record.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers or exhibits, to wit:

(1) Second amended complaint.

(2) Motion of defendants Albert Steinfeld and Bettina Steinfeld, his wife, to dismiss amended complaint.

(3) Motion of defendant Pima Farms Company to dismiss amended complaint.

(4) Motion of defendant Fidelity Savings & Loan Association to dismiss amended complaint.

(5) Order sustaining motions to dismiss, and decree of dismissal, of second amended complaint.

(6) Opinion of District Judge M. T. Dooling, sustaining motions of defendants Albert Steinfeld, Bettina Steinfeld, Pima Farms Company and Fidelity Savings & Loan Association to dismiss amended complaint.

(7) Petition for appeal.

(8) Assignments of error. [25]

(9) Order allowing appeal.

(10) Citation on appeal.

(11) Appeal bond.

(12) This praecipe.

Respectfully,

THOS. ARMSTRONG,

ERNEST W. LEWIS,

R. WM. KRAMER,

JAMES R. MOORE,

Solicitors for Appellant.

Service of the foregoing praecipe accepted and copy thereof acknowledged this 11 day of May, 1923.

SAMUEL L. KINGAN,

JOHN H. CAMPBELL,

ARCHIE R. CONNER,

Solicitors for Appellees.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk.
[26]

In the District Court of the United States, in and
for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD,
FIDELITY SAVINGS & LOAN ASSOCIA-
TION, a Corporation, and PIMA FARMS
COMPANY, a Corporation,

Appellees.

Citation on Appeal (Original)

The President of the United States to Albert Stein-
feld, Bettina Steinfeld, Fidelity Savings &
Loan Association and Pima Farms Company,
GREETINGS:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held in the City
of San Francisco, State of California, within thirty
(30) days from the date of this writ, pursuant to
an appeal filed in the office of the Clerk of the Dis-
trict Court of the United States, District of Arizona,
wherein T. M. Caldwell is complainant and Albert
Steinfeld, Bettina Steinfeld, Fidelity Savings &
Loan Association, a corporation, and Pima Farms
Company, a corporation, et al., are defendants, to
show cause, if any there be, why the judgment
in such appeal mentioned should not be corrected

and speedy justice should not be done in their behalf.

M. T. DOOL-

M. T. D. WITNESS the Honorable ~~W. H. SAW-~~
ING,

~~TELLE~~, Judge of the United States Dis-
trict Court for the District of Arizona this 11th
day of May, 1923.

M. T. DOOLING,

Judge. [27]

Service of the within citation and receipt of a
copy thereof admitted this 11th day of May, 1923.

SAMUEL L. KINGAN,

JOHN H. CAMPBELL,

ARCHIE R. CONNER,

Solicitors for Appellees [28]

[Endorsed]: Filed May 12, 1923. United States
District Court for the District of Arizona. C. R.
McFall, Clerk. By Agnes Borrego, Deputy Clerk.

Copy of within received this 12th day of May,
1923.

KINGAN, CAMPBELL & CONNER. [29]

In the District Court of the United States for the
District of Arizona.

No. E—94 (Tucson.)

ANCILLARY SUIT No. 3:

T. M. CALDWELL,

Appellant,

vs.

EDWIN R. POST et al.,

Appellees.

**Certificate of Clerk U. S. District Court, to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the United States District Court for the District of Arizona, including the records, papers and files in the case of T. M. Caldwell vs. Edwin R. Post et al., numbered E—94—A3 (Tucson) on the Docket of said Court.

I further certify that the attached pages, numbered one to 26, inclusive, contain a full, true and correct transcript of certain records and *and* proceedings in said case, as called for in the praecipe designating parts of record to be included in transcript on appeal, filed in this case and made a part of the transcript attached hereto, as the same ap-

pear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fees for preparing the transcript of this record amount to Eighteen and 05/100 (\$18.05) Dollars, and that the same have been paid to me in full by counsel for the appellant, T. M. Caldwell.

I further certify that the original citation issued in this cause is attached hereto and made a part hereof.

WITNESS my hand and the seal of said court, this 22d day of May, 1923.

[Seal]

C. R. McFALL,
Clerk.

By Agnes Borrego,
Deputy Clerk.

[Endorsed]: No. 4040. United States Circuit Court of Appeals for the Ninth Circuit. T. M. Caldwell, Appellant, vs. Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a Corporation, and Pima Farms Company, a Corporation et al., Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 28, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.